



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. ADC 18798-17

AGENCY DKT. NO. SADC ID #1815

**IN THE MATTER OF MONMOUTH
COUNTY AGRICULTURAL
DEVELOPMENT BOARD RESOLUTION
NUMBER 2017-10-1, HELMLINGER'S
MEADOW HILL FARM, LLC.**

Lauren M. Dooley, Esq., appearing for petitioner Helmlinger's Meadow Hill Farm, LLC (Novins York and Jacobus, attorneys)

Christopher L. Beekman, Esq., appearing for respondent Monmouth County Agriculture Development Board (The Beekman Law Firm, LLC, attorneys)

Record Closed: April 14, 2021

Decided: May 20, 2021

BEFORE **SUSAN M. SCAROLA**, ALJ (Ret., on recall):

STATEMENT OF THE CASE

The petitioner, Christopher Helmlinger, the owner of Helmlinger's Meadow Hill Farm, LLC (HMH farm), acting on behalf of himself and the farm, appeals the Modification of Resolution 2010-11-2 by the respondent, Monmouth County Agricultural Development Board (MCADB), recommending in part and denying in part a Site-

Specific Agricultural Management Practice (SSAMP) for Block 50, Lot 4.03 in the Township of Upper Freehold, in contravention of the Right-to-Farm Act, N.J.S.A. 4:1C-1 through N.J.S.A. 4:1C-10.4., predicated on its use of using source-separated food waste (SSFW) to feed cattle.

A cross-appeal regarding some of the findings of the MCADB was filed by owners of neighboring properties (the complainants).¹

PROCEDURAL HISTORY

The appeal and cross-appeal of the determination of the MCADB were transmitted to the Office of Administrative Law (OAL), where they were filed on December 29, 2017. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On or about March 9, 2020, the cross-appeal was withdrawn by complainants, leaving the MCADB as the sole respondent.

Pre-hearing briefs were submitted by the parties. The hearing was held by Zoom technology on September 28, 2020.² The record remained open for the receipt of summations after transcripts had been received. On January 27, 2021, the parties advised that they would rest on the pre-hearing briefs and would not be submitting any further briefs or summations in this matter. The record then closed.³ The record was re-opened on March 29, 2021, for receipt of additional information, and closed on April 14, 2021, after a telephone conference with counsel.

¹ This cross-appeal was later withdrawn. See *infra*.

² Previously scheduled hearing dates were adjourned due to a personal medical emergency and the COVID-19 emergency.

³ This Initial Decision is filed in accordance with Governor Phillip Murphy's Executive Order 127, issued April 14, 2020, created by the COVID-19 emergency, which provided that deadlines for filing of a recommended decision pursuant to N.J.S.A. 52:14B-10(c) in any non-emergent contested case were extended by the number of days of the Public Health Emergency declared in Executive Order No. 103 (2020) plus an additional 90 days.

FACTUAL DISCUSSION

For Petitioner:

David B. Wunderlich is employed by the New Jersey State Department of Agriculture (DOA). From 2017, his job was coordinator of reviewing feed rations to see if they fit state parameters for use.

Wunderlich has a Bachelor of Science degree in animal science from Ohio State University and has been employed by the DOA since 2004. He was coordinator of dairy programs and management, including organic program management, risk management for crop insurance. He also conducts training in these areas.

His previous experience was as county agricultural agent for Sussex County and regional nutrition for feed composition. In the 1990's he was regional feed nutritionist and had 275 farms to oversee. He continues to oversee farms for the state.

Wunderlich was accepted as an expert in livestock feed management.

Source-separated food waste is any processed material that includes vegetables that are out of date or not pleasantly acceptable for human consumption. SSFW has been around for generations and is the process of feeding leftovers from the food-processing industry to animals. The industry has always done this. It was first used heavily in the swine industry and was used in the western United States for dairy and beef cattle. For thirty years, this area of feed was handled in the animal-health department, but that was not effective, as there were too many different ways to feed stock. The purpose of the regulation of feed products is to try to put standards together. Putting the science together is difficult and it will take some time for New Jersey to develop state regulations on SSFW.

The American Association of Feed Control Officials (AAFCO) has authority over animal feed. It checks the purity, moisture content, and fat content to make sure that what the product says is present is in fact present, such as leftover processed fruit. The

AAFCO manual contains regulatory guidelines for feeding livestock; it is working to get everyone to the same standards. Wunderlich is the New Jersey representative for achieving this in this state. All state departments of agriculture use this group and its reviews of feed-type commodity so that among the states, there is consistency. As forty different states ship feed to New Jersey, it is important to have this consistency of product. The U.S. Food and Drug Administration accepts this.

In 2017, more than one hundred New Jersey farms were using SSFW to feed their stock. Around twenty farms in New Jersey had been feeding SSFW without approval from the DOA. In 2016-2017, he reviewed about twelve farms, located in Sussex, Warren, Hunterdon, Ocean, Burlington, Salem, Monmouth, and Gloucester counties, that were similar to the HMH farm, and that were feeding SSFW to their stock, to see if the rations were science-based. These farms received products that fit the definition of SSFW, such as brewers' grains, soymilk foam, and vegetables. Some of the farms were located close to neighboring homes and some were not; some were more than a quarter of a mile away.

Wunderlich has visited the HMH farm numerous times. He saw no issues at the farm that would adversely or directly affect the public health or safety; everything looked good to him. If there had been violations, he would have issued a warning, and he would have reported any violations to Department of Health or the Department of Environmental Protection (DEP).

Wunderlich was accompanied on his visits to HMH farm by members of the county Agricultural Development Board, the Natural Resource Conservation Service, the Department of Agriculture, as well as soil and water officials. Multiple groups have been to the farm. On October 28, 2016, February 15, 2017, and April 11, 2017, Wunderlich sent letters to the HMH farm to advise the petitioner about practices to ensure that the SSFW products were being fed correctly to the cattle. The HMH farm was consistent in its use of SSFW but occasionally tried different products, which were always reviewed in a timely manner. The petitioner was always receptive to Wunderlich's recommendations. For example, Wunderlich recommended providing the

cattle with bicarbonate of soda to soothe their stomachs, and the petitioner gave it to them.

Wunderlich would get the information about the SSFW used by the petitioner, analyze the feed, look at the book value of the feed, the total digestible nutrients (TDN), and compare it to the standard. If Wunderlich did not know about a particular product, he would consult with Rutgers University or the University of Georgia. The National Resource Council manual averages the content of the SSFW, performs a scientific review, and calculates the TDN. Every feed stuff has a nutritional value. The TDN should be high. The higher the value, the easier it is for the animal to use it. Corn, which can be a primary diet, is 88-90% TDN. A tree is about 40% TDN. SSFW has a TDN percentage in the high 80's. It contains waste products with such things as fruit trimmings, vegetable trimmings, vegetables, and bread. SSFW is closer to a grass diet: it is a good quality feed product; it does not need to be supplemented with extra grain; and it contains a lot of protein, fat, and fiber.

Wunderlich went to HMM farm and saw no problems related to health or safety of humans or animals. He saw how the feed was stored and fed, and how the animals were maintained and cared for. He did not see anything that should not be fed to or that should not be close to the cattle.

Wunderlich looked at the farm site to see if it affected neighbors. The manure problem was fixed. There was nothing notable about the odor from the farm other than normal farm odor. As for by-products, Wunderlich was not aware of any problems. SSFW is human-grade food material, and if stored properly, nothing in it can cause a problem. The odor cannot affect the sense of smell. Wunderlich has been to the HMM farm ten to fifteen times over the past two years. He went there many times without giving advance notice, or with just five to ten minutes' notice to the petitioner.

The role of the County Agricultural Development Board varies across the state. One county has developed specific regulations for feeding SSFW. In 2012, Ocean County offered recommendations to a farm for feeding SSFW. Other counties have

seen SSFW as part of the right to farm. County boards interpret the law and regulations, but they are not the rule makers themselves.

Christopher M. Helmlinger testified that he has resided at 8 Hill Road, Allentown (Upper Freehold, Monmouth County) for almost his entire life, from ages one to twelve and then again from eighteen to thirty-four. Helmlinger started working at the farm in 2003. He acquired ownership of the HMH farm in 2011 when he bought out his cousins' interest from their grandfather's estate after his death in 2009. His grandfather had been the previous owner and had operated HMH farm as a working farm since 1993. In the beginning, the farm produced hay and cattle and there were no issues with neighbors.

In about 2010-2011, Helmlinger started getting complaints about the farm. He applied for and received a site-specific agricultural management practice (SSAMP) determination from the Monmouth County Agricultural Development Board (MCADB) for breeding and raising cows, pigs, and chickens; farming hay; and boarding, training, and sales of horses. The number of cows fluctuated from forty to eighty; now there are about one hundred head of cattle.

The farm was preserved under the Farmlands Preservation Act; he complied with visits from the MCADB. Helmlinger received no notices of any violations from the MCADB nor did the Board make any recommendations for changes in the farm's operation.

Helmlinger began feeding SSFW to his cattle in 2015. He was looking for a cheap energy source for feed, and other farmers in the area were using it. He received information about SSFW from a farm in Ocean County. The product is delivered to the HMH farm by Organix Recycling at no cost to him because New Jersey has a great deal of separated food waste. In the western part of the country, Organix charges farms for it. Helmlinger receives no compensation for using the product.

If not for the SSFW, Helmlinger would be forced to grow corn and silage, which is expensive. There is not much profit in cattle, so the farm tries to save money. He

would have to buy equipment—a tractor, chopper, and silage wagon—and would have to use fertilizer. The farm would become dependent on weather and he would need help to harvest. He would need 1,300 tons of feed and would need at least \$160,000 to get started.

In 2016-2017, the MCADB, the National Resources Conservation Service, and the DOA made recommendations to Helmlinger for managing SSFW storage, which he immediately started implementing and following. He built a new facility for storage of the SSFW; it is roofed with three-sided bunkers with solid walls, and he gets more frequent, but smaller, SSFW deliveries.

Feeding SSFW to cattle provides a great benefit: cattle do great on it; cattle like it; they gain weight great from it; he sells his animals as choice or prime; it is cost effective; and he meets EPA standards by keeping food wastes from the landfill. The cost efficiency of SSFW is the primary reason for using it. as well as the health of the animal. It is a cheap. healthy option that gets good results.

Helmlinger and his family live on the farm which has about 18.9 acres.⁴ Their house is 600 feet from the storage bin and 150 feet from the cattle. They are able to eat meals and have parties outside. He has been able to play outside with his two young children without a problem. He had people to his house for visits outside in 2016 and 2017. There are odors, but it is a farm. Their health is not affected.

Activities on the farm at present are not substantially different from those conducted in 2010, although there may be twenty to thirty more head of cattle. He has no employees on the farm, but runs a school-to-work program in cooperation with the local high school.

The property at 1 Hill Road is located diagonally across the street and is about 1,500 feet away. The owner is Jeff Hozeny who has made no complaints about HMH farm and had sent in a letter of support. The house next door, 12 Hill Road, is 800 feet

⁴ Another 82 acres are leased for a total of approximately 101 acres.

from the feed-storage bin and about 600 feet from the cattle. The owners of that property supported him, too. The owners of 1 Hill Road operate a horse farm less than 100 feet from the Knolls, at 6 Hill road; 12 Hill Farm also has horses. The horses are turned out in pasture about 400 feet from the Knolls. When the SSAMP was processed, neither 1 Hill Road nor 12 Hill Road had any complaints.

Mr. and Mrs. Knoll at 6 Hill Road complained. Their home is about 1,000 feet from the SSFW storage area and 800 feet from the steers. Helmlinger and the Knolls do not have an amicable relationship and he has experienced harassing behavior from them. They have a history of complaints about the farm. The Knolls complained about his wife's arena and the smell of manure, and that calves were tied to trees.

Helmlinger received other complaints from Jeff Gale and McEvoy, and received phone calls from them about being upset that he was using the SSFW product. To address this, he tried to get one load per week and to stop delivery in the summer, but they kept complaining about the fruit and vegetable smell and said that it should not be fed to cattle at all. He briefly tried stopping the use of SSFW for a few weeks, but the complaints continued to come in from the Knolls and other property owners, the Malsburys. Neither the Gales, nor the Knolls, nor the McEvoy's have farms.

Helmlinger has horses on his property, livestock creates an odor—it is part of farming. The HMM farm is in Upper Freehold, and within a one-mile radius there are about twenty farms on his road. Upper Freehold takes pride in having 10,000 acres of preserved farmland, which includes manure, turkeys, hay, corn, straw, fruit, and vegetables on the properties. There are quite a few livestock-farming operations in Upper Freehold, but none of his size. There are also large horse farms. There are also other farms that feed SSFW to their stock, but not to his scale. In Ocean County, some farms use SSFW.

At times, there were different smells from SSFW and manure. As far as odors, at times he smells the cow lot and the SSFW. He can also smell other farms' horse manure in the area. He can smell the SSFW at times in his backyard. He can also

smell other odors to the end of his driveway. He has no health issues and his sense of smell has not been affected. There is no drainage from the food operation.

State and county entities visited the property. Helmlinger was not told when the visits would occur, and he has told them not to call before coming to the farm. He moved the cattle around the same way every day, and has not changed the number of animals he had.

Helmlinger has had no DEP violations; he has had no violations from the Monmouth Board of Health; he had no violations prior to the filing of this complaint in 2017. No violations have been charged since the filing of this complaint.

For Respondents:

Jeffrey G. Gale, a retired State trooper, testified that he has resided at 2 Hill Road since 1993 when he built his house. It is located about 800 feet from the feed lot and downhill and downwind from HMH farm. He had a pleasant relationship with Helmlinger's grandfather and grandmother, but the nature of the farm then was different. It was a smaller farm back then, with less pasture and fewer animals, maybe two dozen. Gale also had an amiable relationship with Helmlinger, but it started to become different in 2015–2016. Helmlinger's wife had a horse who escaped her property and crashed into his backyard. On Halloween 2015 or 2016 there was a subsequent incident where sixty to eighty animals escaped through the farm fence, and were all over Gale's property.

The start of the overwhelming odor coincided with the delivery of SSFW. The odor was bad in 2015–2017. The trucks came by and the odor was overwhelming. He called Helmlinger and explained it to him that the odor was awful. Helmlinger said he would stop and wait. Gale never called to complain until September, and made calls to the DEP. Gale said he could do no activity outside his house because of this. Things became worse in the winter.

This smell is not manure smell. It smells like rotting food, like a compost pile. It has affected his quality of life; his proximity and the nature of his location are downhill and downwind. He built his house to catch the wind. The smells come and go; they lay against the back of his house; he cannot use his property; and he cannot keep his windows open. It is also the psychological aspect of not knowing from one hour to the next and when the smells will change. It is taxing mentally, and he feels congested. His sense of smell has changed.

Gale is familiar with agriculture in Upper Freehold Township, which has a farm country code.

Barbara McEvoy, Gale's aunt, resides at 110 Arneystown Road, and her property, about forty acres, backs up to the property line of the HMH farm. Her home is not that far from feed storage. She has lived in that house and property her whole life.

Helmlinger's grandfather was a nice guy; she never thought of HMH farm as a farm as much as it was a small piece of property. In 2015–2016 issues arose from the farm: the smell of the manure changed; it smelled like a landfill and manure. She does not mind the manure smell, but this was not like any other odor. In the summer of 2016, there was nitrate poisoning and the source was food waste or manure.

The odor has impacted her life. She has an inability to spend time outside. There is no way to know when the smell would occur. It depended on the wind direction or when the feed arrived. Air movement is a big factor, as when the wind comes from the north or northeast. The smell was horrible and unpredictable. It was the odor of rotting food, like landfill and manure. The smell became worse because the farm property was small, but there were more animals.

The best situation depended on the wind, and that was unpredictable. Sometimes it was caused by moving things around on the farm, and there was noise of heavy operating equipment at late hours. She may have sent emails to Helmlinger to ask him to stop spreading manure and asked if he could refrain from doing that, and he said yes.

From 2015 through 2017, if she planned on something outside, they could be forced to go inside. Playing in the yard was limited; she likes to eat outside but cannot. This has had a huge impact on her, and it is depressing and disheartening. The state never reached out to her for a health or safety study.

Denise Knoll, lives at 6 Hill Road, Upper Freehold, in front of the HMH farm. Her backyard adjoins the front of the farm, which is west of her. Knoll has lived there for twenty years. Barbara McEvoy lives at the end of the road to the right.

She had a good relationship with Walt and Marian Helmlinger, Helmlinger's grandfather; after Marian died, Walt came to her home every Thursday night for dinner. HMH farm was a small family farm. Walt Helmlinger ran the farm for property tax relief; he had twelve cows and rotated them from field to field and fed them on grains and hay. The changes started in 2010 when the farm moved dirt for an arena, and then after the 2010 SSAMP resolution.

On October 31, 2015, the cows got out and trampled vegetation.

Knoll noticed horrendous odors, and that delivery trucks to HMH farm were from Organix. The odor takes your breath away and is like a bad potato. Her eyes will tear, and she gets headaches from the odor. On the best day, the off-and-on odor is not strong, but there is always a garbage odor. On the worst days, she cannot tolerate it. It is stressful. This situation has affected the use of her property. She cannot stay outside or put clothes on the line or eat on the deck. She opened her pool in 2016, but has since stopped opening it. She uses the air conditioner all summer and feels like a prisoner in her own house.

She has not hired any professionals to test the air because it is too expensive.

FINDINGS

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

I accept the testimony of all the witnesses as credible, recognizing that when describing odors the sense of smell is particularly subjective to each person, and that some neighbors may have found the odors overwhelming. This concern of the neighbors is not discounted, but the HMH farm is a cattle farm—a commercial farm with an approved SSAMP—and smells are to be expected. The neighbors may have gotten used to seeing fewer head of cattle in prior years, but the growth of the farm business was supported by its acreage and was neither restricted nor unexpected.

The major complaint presented by the neighbors stems from the HMH farm's use of SSFW as cattle feed and the odors it causes. The testimony of Wunderlich, an expert in livestock feed management and an employee of the New Jersey State Department of Agriculture was impressive. He was particularly credible and candid, as he had no bias or interest in the outcome. While the complaining witnesses described the "unbearable" odor emanating from the SSFW and the effect it had on their quality of life, Wunderlich was not aware of any smells, other than those he would normally expect, on his numerous and unannounced visits to the HMH farm.

To address the neighbors' complaints, Wunderlich made recommendations to the petitioner: he advised him to modify some practices and to make some improvements to reduce or eliminate odors that could arise from the use of the feed or from the cows. The petitioner followed every recommendation made by Wunderlich; the storage of the SSFW on the farm was improved; bicarbonate was added to the cattle feed to reduce odors; and delivery dates of the SSFW were modified so that large amounts were not delivered at once.

The DOA and Rutgers University have both recognized that feeding SSFW to cattle is economically and ecologically advantageous to farmers, particularly in this state, where the feed is highly nutritious and is delivered to farmers without charge. Oversight is provided by the DOA for the practice. Wunderlich periodically visits farms in the state, including the HMH farm, to make sure that they are compliant with the practices for feeding SSFW to cattle and to ensure that the nutritional value of SSFW as cattle feed is maintained. At least several counties permit its use and at least one has regulations regarding it.

LEGAL ANALYSIS

This issue presented here is whether the respondent, Monmouth County Agricultural Development Board (MCADB), acting upon a complaint filed by owners of neighboring properties, properly granted a Modification of Resolution 2010-11-2, a previously granted site-specific management plan for the petitioner, Helmlinger and the HMH farm, that recommended in part and denied in part a site-specific agricultural management practice for Block 50, Lot 4.03 in the Township of Upper Freehold. The ruling stemmed from a conclusion by the MCADB that petitioner's use of SSFW to feed the cattle was not a generally accepted farm management practice or a permissible activity for a commercial farm that would ordinarily be protected by New Jersey's Right-to-Farm Act (Act). N.J.S.A. 4:1C-1 through N.J.S.A. 4:1C-10.4.

The petitioner bears the burden of proof by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962) (citations omitted).

Background

In 2010, the MCADB adopted resolution 2010-11-2, which found that the HMM farm (Block 50, Lot 4.03 in the Township of Upper Freehold) had applied for and had received approval for site-specific agriculture management practice (SSAMP) for a farm operation that consisted of breeding and raising of cows, pigs, and chickens; farming hay; and the boarding, training, and sale of horses. The HMM farm was recognized as a commercial farm, as it met the requirements of the Act. N.J.S.A. 4:1C-3. The farm had no less than five acres of land (it was approximately 101 acres⁵); it produced agricultural/horticultural products worth at least \$2,500 per year; it was eligible for differential property taxation pursuant to the Farmland Assessment Act of 1964; and it was located in an area where agricultural use was permitted under the municipal zoning ordinance and was consistent with the master plan.⁶ The HMM farm was therefore entitled to the protections afforded to it under the Act. No limitations on farming practices were set forth in the SSAMP.

Farming continued on the site without incident until 2017, when the complainants brought the issue of the HMM farm feeding SSFW to the farm's cattle, noticeably increasing the odors emanating from the site, to the attention of the MCADB by filing a complaint alleging that the HMM farm failed to comply with the SSAMP and, as a result, issues relating to runoff, rodents, and odors were affecting their quality of life as neighbors of the farm. The petitioner had not filed for any modification of the SSAMP.

The Right-to-Farm Act

N.J.S.A. 4:1C-10 provides that in all actions filed subsequent to the relevant effective date of the 1998 amendments,

there shall exist an **irrebuttable presumption** that **no commercial agricultural operation, activity** or structure **which conforms to agricultural management practices**

⁵ According to the SSAMP, the farm management unit consists of 19.08 acres plus or minus 82 acres of leased acreage for a total of plus or minus 101 acres.

⁶ The land had also been preserved under New Jersey's Farmland Preservation Act.

recommended by the committee and adopted pursuant to the provisions of the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.), **or whose specific operation or practice has been determined by the appropriate county board**, or in a county where no county board exists, the [State Agricultural Development] [C]ommittee, **to constitute a generally accepted agricultural operation or practice**, and all relevant federal or State statutes or rules and regulations adopted pursuant thereto **and which does not pose a direct threat to public health and safety, shall constitute a public or private nuisance, nor shall any such operation, activity or structure be deemed to otherwise invade or interfere with the use and enjoyment of any other land or property.**

[Emphasis added]

N.J.S.A. 4:1C-3 provides the relevant definitions for the Act:

"*Board*" or "*county board*" means a county agriculture development board established pursuant to section 7 of P.L.1983, c.32 (C.4:1C-14).

"*Commercial farm*" means (1) a farm management unit of no less than five acres producing agricultural or horticultural products worth \$2,500 or more annually, and satisfying the eligibility criteria for differential property taxation pursuant to the "Farmland Assessment Act of 1964," P.L.1964, c.48 (C.54:4-23.1 et seq.), (2) a farm management unit less than five acres, producing agricultural or horticultural products worth \$50,000 or more annually and otherwise satisfying the eligibility criteria for differential property taxation pursuant to the "Farmland Assessment Act of 1964," P.L.1964, c.48 (C.54:4-23.1 et seq.), or (3) a farm management unit that is a beekeeping operation producing honey or other agricultural or horticultural apiary-related products, or providing crop pollination services, worth \$10,000 or more annually.

"*Committee*" means the State Agriculture Development Committee established pursuant to section 4 of P.L.1983, c.31 (C.4:1C-4).

The HMH farm satisfies the definition of a "commercial farm" and is therefore entitled to protection under the Act provided it conforms to agricultural management

practices recommended by the Committee or whose specific operation practice has been determined by the county board to be a generally accepted agricultural operation or practice.

The Act sets forth a list of agricultural management practices that are permissible activities that may be conducted by commercial farm owners. N.J.S.A. 4:1C-9 provides that:

Notwithstanding the provisions of any municipal or county ordinance, resolution, or regulation to the contrary, the owner or operator of a commercial farm, located in an area in which, as of December 31, 1997 or thereafter, agriculture is a permitted use under the municipal zoning ordinance and is consistent with the municipal master plan, or which commercial farm is in operation as of the effective date of P.L.1998, c.48 (C.4:1C-10.1 et al.), and the operation of which conforms to agricultural management practices recommended by the committee and adopted pursuant to the provisions of the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), **or whose specific operation or practice has been determined by the appropriate county board**, or in a county where no county board exists, the committee, **to constitute a generally accepted agricultural operation or practice**, and all relevant federal or State statutes or rules and regulations adopted pursuant thereto, and which does not pose a direct threat to public health and safety may:

a. Produce agricultural and horticultural crops, trees and forest products, livestock, and poultry and other commodities as described in the Standard Industrial Classification for agriculture, forestry, fishing and trapping or, after the operative date of the regulations adopted pursuant to section 5 of P.L.2003, c.157 (C.4:1C-9.1), included under the corresponding classification under the North American Industry Classification System; . . .

[Omitted b. through i. as not applicable here.]

j. Engage in any other agricultural activity as determined by the State Agriculture Development Committee and adopted by rule or regulation pursuant to the provisions of the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.)

[Emphasis added.]

Without doubt, the production of livestock includes their feeding, and is an acceptable farm management practice. The issue here, though, is whether the feeding of SSFW is a generally accepted agricultural management practice and therefore entitled to protection under the Act. The use of SSFW has not been the subject of any regulations adopted by the State Agriculture Development Committee pursuant to the Administrative Procedures Act, nor has a specific agricultural management practice been developed by the State regarding the use of SSFW to feed cattle.

The Complaint

N.J.S.A. 4:1C-10.1 provides as follows:

a. Any person aggrieved by the operation of a commercial farm shall file a complaint with the applicable county agriculture development board or the State Agriculture Development Committee in counties where no county board exists prior to filing an action in court.

b. In the event the dispute concerns activities that are addressed by an agricultural management practice recommended by the committee and adopted pursuant to the provisions of the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.), the county board shall hold a public hearing and issue findings and recommendations within 60 days of the receipt of the complaint.

c. In the event the committee has not recommended an agricultural management practice concerning activities addressed by a complaint, the county board shall forward the complaint to the committee for a determination of whether the disputed agricultural operation constitutes a generally accepted agricultural operation or practice. Upon receipt of the complaint, the committee shall hold a public hearing and issue its decision, in writing, to the county board. The county board shall hold a public hearing and issue its findings and recommendations within 60 days of the receipt of the committee's decision.

d. Any person aggrieved by the decision of the county board shall appeal the decision to the committee within 10 days. The committee shall schedule a hearing and make a determination within 90 days of receipt of the petition for review.

e. The decision of the State Agriculture Development Committee shall be binding, subject to the right of appeal to the Appellate Division of the Superior Court. Any decision of a county agriculture development board that is not appealed shall be binding.

[Emphasis added.]

Here, the complaint about the farming practices was filed with the county board. Counsel for the Board advised that they had reviewed the Act in detail and had considered whether the Board had authority to act on the complaint under N.J.S.A. 4:1C-10.1(a). or whether it needed to refer the complaint, and the practice of feeding SSFW to cattle, to the Committee for a determination of whether that practice was a generally accepted agricultural practice under N.J.S.A. 4:1C-10.1(c). The Board concluded that since an SSAMP had previously been granted to the HMH farm, it could act on the complaint of the neighbors, conduct its investigation, hold its hearing, and make a final determination. Further, N.J.S.A. 4:1C-9 referred to the appropriate county board as being able to make a determination of the specific **operation or practice**, which would support its decision to handle the matter itself.⁷

⁷ N.J.S.A. 4:1C-9 provides:

"Notwithstanding the provisions of any municipal or county ordinance, resolution, or regulation to the contrary, the owner or operator of a commercial farm, located in an area in which, as of December 31, 1997 or thereafter, agriculture is a permitted use under the municipal zoning ordinance and is consistent with the municipal master plan, or which commercial farm is in operation as of the effective date of P.L.1998, c.48 (C.4:1C-10.1 et al.), and the operation of which conforms to agricultural management practices recommended by the committee and adopted pursuant to the provisions of the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), or whose specific operation or practice has been determined by the appropriate county board, or in a county where no county board exists, the committee, to constitute a generally accepted agricultural operation or practice, and all relevant federal or State statutes or rules and regulations adopted pursuant thereto, and which does not pose a direct threat to public health and safety may:

a. Produce agricultural and horticultural crops, trees and forest products, livestock, and poultry

After accepting the filing of the complaint pursuant to N.J.S.A. 4:1C-10.1(a), the MCADB held a hearing and issued its decision on November 14, 2017, concluding that:

1. [The runoff issues, presence of rodents, and animal waste management and associated odors stemming from the subject property have been properly mitigated and found by the MCADB to be generally accepted farm management practices and are permissible activities for a commercial farm, under the New Jersey Right to Farm Act, subject to the above conditions as set forth in the findings of fact and conclusions of law.⁸]

2. **The use of source-separated food waste as cattle feed and the odors associated with this process under its current use is found by the MCADB to not be a generally accepted farm management practice nor a permissible activity for a commercial farm, as the practice of using food waste as the primary source of a steer's diet is not commonplace in the industry, the practice is potentially exacerbating the odor emanating from the subject property, and, at this point, there is no related AMP or affiliated regulations in place at this time associated with the New Jersey Right to Farm Act.**

[Emphasis added.]

The SSAMP created for the HMH farm provided for the “breeding and raising of cows,” and feeding cows is part of their breeding and raising. By its determination that the feeding of SSFW was not a generally accepted agricultural management practice, the Board effectively decided that the HMH farm was therefore not entitled to protection under the Act for its use of this practice.

SSFW

It would appear that the language of the Act is not completely clear as to what is in the county boards' purview and what is not, and who should have the right to make the determination of whether a proposed agricultural practice is generally accepted, particularly where an SSAMP has previously been approved for that property or where

⁸ This issue has been resolved and is not part of this appeal.

that agricultural practice has been the subject of determinations in different counties.⁹ Can the county board interpret the law and regulations to make a finding about the acceptability of an agricultural management practice such as feeding SSFW to cattle?

Assuming, as argued by the Board's counsel, that the county board has this authority to determine whether feeding SSFW to cattle is a generally accepted agricultural management practice, the inquiry turns to whether that determination was arbitrary and capricious. The New Jersey DOA has supervised with success the implementation of feeding cattle SSFW at farms across the state. Clearly, the DOA has found this practice to be acceptable for farmers such that it should be considered a generally accepted agricultural management process. As such, this practice would be entitled to protection under the Act. While not every farm takes advantage of the economic and ecological benefits of feeding SSFW to cattle, the ones that do can be protected under that Act provided that the practice does not pose a direct threat to public health and safety. See Curzi v Raub, 415 N.J. Super. 1 (App. Div. 2009) and Twp. of Franklin v. den Hollander, 172 N.J. 147, 150-51 (2002).

Here, the only allegation for direct threats to health and safety were the odors coming from the HMH farm. To the neighbors, the odors were overwhelming. To Wunderlich, the neutral observer, the odors were no different from farm odors he encountered throughout the state. While recognizing that odors are particular to an individual, these neighbors may be more sensitive than the observer of many farms who is familiar with what is acceptable and what is not. Moreover, recognizing that the odors caused the neighbors concern, Wunderlich made recommendations to the petitioner so that they could be remediated. By following the supervision of the DOA, the original conditions complained of were ameliorated by the petitioner when he complied with the recommendations to provide better storage for the feed and to modify the delivery schedule. No citations were ever issued to the HMH farm for any violation of the public health and safety and no evidence was presented to show that the feeding of SSFW to cattle created a direct threat to the public health and safety.

⁹ The board noted in its determination that "there is no related AMP or affiliated regulations in place at this time associated with the New Jersey Right to Farm Act." This would have supported the referral to the Committee pursuant to N.J.S.A. 4:1C-10.1.c. prior to the hearing before the county board.

No evidence was presented to support the conclusion that feeding cattle SSFW is not considered a generally accepted farm management practice because it is a direct threat to the public health and safety. Rather, the State DOA approves of its use and provides assistance to farmers to ensure that the feeding of SSFW to cattle provides a high level of nutrients to cattle while being utilized in a manner that is not deleterious to the public's health and safety.

CONCLUSION

Accordingly, the determination of the Board that the use of SSFW to feed cattle is not a generally accepted farm management practice nor a permissible activity for a commercial farm is arbitrary and capricious.¹⁰ It has not been demonstrated that the use of SSFW to feed cattle is a direct threat to the public health and safety. Accordingly, the practice of feeding SSFW to cattle is protected under the Act. The Board's determination that effectively modified the original SSAMP to prohibit this practice was unsupported by the evidence presented and accordingly must be reversed.¹¹

ORDER

I **ORDER** that the determination of the Monmouth County Agricultural Board, determining that the feeding of SSFW to cattle is not a generally accepted agricultural management practice, and thereby amending the November 2010 SSAMP to prohibit such practice, is hereby **REVERSED**.

I hereby **FILE** my initial decision with the **STATE AGRICULTURE DEVELOPMENT COMMITTEE** for consideration.

¹⁰ The Committee is, of course, able to develop its own regulations for feeding of SSFW to cattle so that there is uniformity throughout the state for this practice which appears presently to not be the case.

¹¹ N.J.A.C. 2:76 -2.3 provides that a commercial farm owner may apply to the board to determine if the proposed operation constitutes a generally accepted management practice included in any of the activities set forth in NJSA 4:1C-9 and sets forth the procedure for determination. That did not occur here where the result was that the MCADB effectively amended the SSAMP for the HMH farm without advising the petitioner of its intent to do so or the petitioner applying for one.

This recommended decision may be adopted, modified, or rejected by the **STATE AGRICULTURE DEVELOPMENT COMMITTEE**, which by law is authorized to make a final decision in this matter. If the State Agriculture Development Committee does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **EXECUTIVE DIRECTOR OF THE STATE AGRICULTURE DEVELOPMENT COMMITTEE, Health/Agriculture Building, PO Box 330, Trenton, New Jersey 08625-0330**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 20, 2021

DATE



SUSAN M. SCAROLA, ALJ (Ret., on recall)

Date Received at Agency:

Date Mailed to Parties:

SMS/cb

APPENDIX

WITNESSES

For petitioner:

David B. Wunderlich
Christopher M. Helmlinger

For respondent:

Jeffrey G. Gale
Barbara McEvoy
Denise Knoll

EXHIBITS

Joint:

J-A Resolution 2010-11-12 adopted by MCADB
J-B Deed of Easement for Property issued by the NJ Agriculture Retention
and Development Program
J-C Right to Farm Complaint filed March 17, 2017
J-D Answer to Right to Farm Complaint filed May 25, 2017
J-E Resolutions 2017-10-1 and 2017-5-1 adopted by the MCADB
J-F Aerial Map of Petitioner's Property
J-G Topographic Map of Petitioner's Property

For petitioner:

P-A Nature's Blend Fruit Plus Feed Label
P-B Upper Freehold Township Comprehensive Farmland Preservation Plan
page 3
P-C Upper Freehold Township Ordinance No. 7-81
P-D Approval Letters from NJDOA
P-E Monmouth County Board of Health Memo dated April 24, 2017
P-F "Feeding Animals-The Business Solution to Food Scraps"

P-G Farm Inspection on July 22, 2011 by MCADB

P-H SADC Resolution #FY2018R5(11)

P-I Photos of the Farm

For respondent:

None